NOTICE
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NOS. 4-17-0792, 4-17-0793 cons.

FILED
July 3, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

GRAHAM UTTER, Plaintiff-Appellee, v. (No. 4-17-0792) DANNY UTTER, Defendant-Appellant.	)	Appeal from the Circuit Court of Schuyler County No. 14LM10
In re ESTATE OF FRANK UTTER, Deceased (Graham Utter, Petitioner-Appellee, v. (No. 4-17-0793) Estate of Frank H. Utter, Respondent).	)	No. 14P17 Honorable Jerry J. Hooker, Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Harris and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment, finding defendant had tortiously interfered with the contract between plaintiff and decedent, was affirmed, as was the award of damages. Defendant forfeited certain arguments presented on appeal by not making those claims before the trial court.

¶ 2 Plaintiff, Graham Utter, filed a lawsuit against his uncle, defendant, Danny Utter, claiming Danny tortiously interfered in the cash farm lease between Graham and his late grandfather, Frank Utter. The trial court entered judgment in Graham's favor and awarded damages. Defendant appealed, claiming (1) he was entitled to a qualified privilege to interfere

with the contract as Frank's agent under a power of attorney for property; (2) the court's award of lost-profit damages did not include rent owed to Frank; and (3) the court erred in precluding testimony of Frank's prior attorney under the Dead-Man's Act. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Frank Utter owned farm ground in Schuyler County, Illinois. Plaintiff, Graham Utter, is Frank's grandson and had been leasing and farming Frank's land since 2001 via a 50-50 crop-share agreement. Defendant, Danny Utter, is Frank's son and Graham's uncle. We will refer to the parties using their first names only for ease and clarity.

¶ 5 On October 15, 2013, through the powers granted him in a February 2012 power of attorney executed by Frank, Danny notified Graham of the termination of the farm lease by sending him the first "notice to quit" the land. Nevertheless, on October 19, 2013, Graham entered into a written farm lease with Frank, which allowed Graham to farm the land for the 2014 crop year (between February 1, 2014, and January 31, 2015). In his lawsuit, Graham claims Danny either did not terminate the lease properly or had no authority to do so. Frank died in July 2014.

¶ 6 In September 2014, Graham filed a (1) civil lawsuit against Danny personally in Schuyler County case No. 14-LM-10, alleging tortious interference of a contract (count I) and, alternatively, tortious interference with a business expectancy if no contract was found (count II) and (2) a claim against Frank's estate in Schuyler County case No. 14-P-17. In both cases, Graham claimed he was due $13,863 in lost profits, $2591 in expenses, and $5000 for rent already paid under the lease for a total of $21,454. However, Graham later amended the damages to account for the return of $5000 from Danny to Graham. The trial court consolidated the cases.

¶ 7 On August 28, 2017, the bench trial began. Graham testified he was 36 years old and was employed as a fertilizer salesperson and farmed part time. He farmed approximately 270 acres with his parents, and in 2001, he started leasing and farming between 60 and 100 acres of Frank's land. Initially, Graham and Frank had a 50-50 crop share agreement. In 2012, the lease agreement was changed to a cash-rent basis. Graham had a verbal lease to farm Frank's land for the 2013 crop year, which ran from March 1, 2013, to February 28, 2014, and he assumed he would be farming the land during the 2014 crop year, which ran from February 1, 2014, to January 31, 2015. In fact, Graham presented a cash rent lease agreement for the 2014 crop year. This lease, dated October 19, 2013, and signed by Frank personally, was marked as plaintiff's exhibit No. 3. This lease provided Graham the authority to farm Frank's land for the 2014 crop year on a $100-per-acre cash basis with an automatic renewal.

¶ 8 However, on an unknown date but sometime prior to "the date on exhibit [No.] 3, which is the cash farm lease," the Sheriff delivered to Graham a notice to quit dated October 15, 2013, signed by "Frank Utter by Danny Utter P.O.A.," advising Graham that Frank had elected to terminate the lease and ordered Graham to "deliver up possession" of the farmland "at the end of the lease year, the last day of such year being February 28, 2014." This notice was marked as plaintiff's exhibit No. 2 and introduced into evidence.

¶ 9 In April 2014, the Sheriff delivered to Graham a second notice to quit dated October 23, 2013. By this time, Graham said he had already worked the land for the 2014 crop year by mowing and planting 19 acres of corn. He had expenses for seed and insecticide and had paid $5000 as half of the rent. The Sheriff arrested Graham for trespassing.

¶ 10 Graham sought damages in the amount $13,863 in lost profits and $7591 in expenses, which included $5000 paid in rent, for a total of $21,454. However, Graham

acknowledged Danny had reimbursed him the rent paid, thereby reducing the amount sought to $16,454.

¶ 11 Graham called Danny as an adverse witness. Danny claimed his attorney, Randall Bower, was the one who had Graham removed from the farmland, not him.

¶ 12 In his case in chief, Danny called Bower as a witness. Bower testified he had retired from the practice of law at the end of 2014. In the spring of 2013, Bower met with Frank to "revamp" his will. During the meeting, Frank presented Bower with a "Power of Attorney for Property" that had been prepared by another attorney appointing Danny as Frank's power of attorney. In October 2013, Bower met with "Danny and/or Frank" to discuss the preparation of a notice to quit the verbal lease agreement in place with Graham. Bower testified "And, as I recall, Frank wanted to terminate that relationship." Graham's attorney objected on the grounds that such a statement was barred by the Dead Man's Act (735 ILCS 5/8-201 (West 2012)). The trial court sustained the objection and barred any conversation Bower had with Frank as it pertained to the "farm lease." On cross-examination, Bower said he was never made aware of or presented with a "written lease between Frank *** and Graham *** for 2014."

¶ 13 Danny testified on his own behalf. He disputed that Graham had worked the ground in the fall of 2013 or the spring of 2014. He said Graham "did not do anything" but "chopped some stalks right along the road" in 2014 and planted only seven-and-a-half acres.

¶ 14 At the close of evidence, the parties agreed to submit written closing statements. On September 29, 2017, the trial court entered a written order finding in Graham's favor on count I, tortious interference with a contract. The court stated as follows:

> "Powers of attorney don't prohibit the principal from entering into contracts as long as they are competent. The court heard no evidence that Frank

> Utter had been declared or was incompetent on October 19, 2013. The farm lease entered into between Graham Utter and Frank was valid. Therefore, there was a contract at issue, and thus it is count I of the LM [(Schuyler County case No. 14-LM-10)] complaint the court addresses. The court does not believe Danny Utter can terminate a valid farm lease by sending a second notice to quit as a power of attorney."

¶ 15 The trial court found Danny had tortiously caused the breach of contract between Graham and Frank. As such, Danny was liable for damages. The court found Graham's testimony as to damages was credible and awarded him $16,545 [*sic*] in damages plus costs. The court found Frank's estate was not liable and denied Graham's claim. This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Danny raises three issues on appeal. First, he insists the trial court's judgment finding him liable for the tortious interference with the 2014 lease must be reversed because, as Frank's agent, his conduct was privileged or justified. Second, he claims the trial court erred in calculating Graham's lost-profit damages. Third, he contends Graham was not entitled to raise the protections of the Dead-Man's Act because he was not a representative of the estate and the court erred in excluding Bower's testimony regarding alleged conversations with Frank.

¶ 18 In response to these claims, Graham asserts Danny has forfeited all three issues by not presenting them to the trial court for argument or consideration, as he raises all three claims for the first time in this appeal. We agree a litigant cannot raise a new theory after trial. Illinois courts have repeatedly held that arguments, even those raising constitutional issues, not raised in the circuit court are forfeited and may not be raised for the first time on appeal. See, *e.g.*, *In re Marriage of Pratt*, 2014 IL App (1st) 130465, ¶ 23 ("Arguments raised for the first time on

appeal are waived."); *Bowman v. Chicago Park District*, 2014 IL App (1st) 132122, ¶ 59 ("[I]ssues not raised in the trial court are waived and may not be considered for the first time on appeal."); *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 121 (2004) ("it is 'axiomatic that questions not raised in the trial court are deemed waived and may not be raised for the first time on appeal.' ") (quoting *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 500 (1985)); see also *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010) ("A reviewing court will not consider arguments not presented to the trial court.").

¶ 19 With this standard in mind, we will address each of Danny's claims raised in this appeal to ascertain whether the particular issue has been indeed forfeited as Graham asserts.

¶ 20 A. Qualified Privilege

¶ 21 Danny acknowledges that, although a qualified privilege has not been previously applied to the agent-principal relationship under Illinois law, this court should, for the first time, extend such privilege in this case. He contends, as Frank's agent, he was entitled to a qualified privilege to interfere with the contract between Frank and Graham.

¶ 22 The essential elements of a tortious-interference-with-contract claim are generally recognized as:

> " '(1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of this contractual relation; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant's wrongful conduct; and (5) damages.' " *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 154-55 (1989) (quoting *Prudential Insurance Co. v. Van Matre*, 158 Ill. App. 3d 298, 304 (1987)).

¶ 23 Courts will recognize a privilege in intentional interference with contract cases "where the defendant was acting to protect an interest which the law deems to be of equal or greater value than the plaintiff's contractual rights." *HPI Health Care*, 131 Ill. 2d at 157. Under certain circumstances, a third party may be privileged purposely to bring about a breach of contract between other parties. *Schott v. Glover*, 109 Ill. App. 3d 230, 234 (1982).

¶ 24 Under these circumstances, the privilege would theoretically apply to Danny if the court found he was acting to protect the superior interest of Frank's rights in the contract. "A defendant protected by a privilege is not justified in engaging in conduct totally unrelated or antagonistic to the interest that gave rise to defendant's privilege." *Turner v. Fletcher*, 302 Ill. App. 3d 1051, 1058 (1999) (citing *HPI Health Care*, 131 Ill. 2d at 158). This court noted in *Turner* that, in *HPI Health Care*, our supreme court held " 'where the conduct of a defendant in an interference with contract action was privileged, it is the plaintiff's burden to plead and prove that the defendant's conduct was unjustified or malicious.' " *Id.* (quoting *HPI Health Care*, 131 Ill. 2d at 156). In expounding on what would be required to prove the existence of a privilege, this court explained:

> "The 'malice' requirement is met by showing the interference was intentional and without justification. [Citation.] To establish an alleged interference was 'unjustified,' the plaintiff must do more than merely assert the defendant's conduct was unjustified. The plaintiff must set forth 'factual allegations from which it can reasonably be inferred that the defendant's conduct was unjustified.' " *Turner*, 302 Ill. App. 3d at 1058-59 (quoting *HPI Health Care*, 131 Ill. 2d at 158).

¶ 25 In light of the respective burdens placed on the parties, in particular the burden placed on Graham, we cannot excuse Danny's forfeiture of this issue. To determine whether Danny was entitled to a qualified privilege, he would have been required to plead the privilege as an affirmative defense. See *Rosner v. Field Enterprises, Inc.*, 205 Ill. App. 3d 769, 791 (1990) (a qualified privilege is raised as an affirmative defense). Graham would then have been required to respond with evidence of malice to overcome Danny's claimed privilege. It is apparent from the trial court's order, malice was not a consideration at trial. That is, the court specifically noted in its order "[m]alice is not required."

¶ 26 Contrary to Danny's argument in his reply brief, raising the defense of a qualified privilege requires proof different than that required to overcome an agent's statutory immunity from liability. See 755 ILCS 45/2-7(a) (West 2014). Therefore, Danny's claim set forth in his written closing argument that he was immune from liability pursuant to section 2-7(a) of the Illinois Power of Attorney Act (755 ILCS 45/2-7(a) (West 2014)), did not properly preserve his qualified-privilege claim for appeal. They are not the same. Because (1) Danny did not raise the claim in the trial court; (2) Graham, in turn, did not produce evidence to rebut such a claim; and (3) as a result, the court did not have the opportunity to consider such a claim, we find Danny has forfeited the possible application of a qualified privilege. We will not consider the issue for the first time on appeal.

¶ 27 B. Lost Profit Damages

¶ 28 Danny next contends, when considering Graham's lost-profit damages, the trial court failed to take into account the $10,000 in rent that Graham would have paid to Frank pursuant to the written lease. Danny argues the court's $13,863 award of lost profits should be

reduced by the $10,000 owed to Frank for rent. We find Danny sufficiently preserved this issue for appeal by including the argument in his written closing statement.

¶ 29 “The reviewing court will not disturb the damages assessed by a trial court sitting without a jury unless its judgment is against the manifest weight of the evidence.” *Royal’s Reconditioning Corp. v. Royal*, 293 Ill. App. 3d 1019, 1022 (1997); see also *Stein v. Spainhour*, 167 Ill. App. 3d 555, 561 (1988) (“The fixing of damages is a function of the trier of fact and should not be disturbed upon review unless there is no evidence in support of the verdict or it is obviously the result of passion or prejudice”). “A trial court’s damages assessment is against the manifest weight of the evidence when [the court] ignored the evidence or used an incorrect measure of damages.” *Royal*, 293 Ill. App. 3d at 1022.

¶ 30 Where lost profits are being calculated to measure damages for breach of contract, only those costs that are avoided by the defendant’s breach are subtracted from the plaintiff’s projected revenue to determine lost profits. See *Sterling Freight Lines, Inc. v. Prairie Material Sales, Inc.*, 285 Ill. App. 3d 914, 918 (1996) (“Those costs that are avoided as a result of the defendant’s breach are deducted from the contract price.”).

¶ 31 Danny does not dispute the calculation of lost profits in terms of the likely yield of corn and beans. Instead, he purports to claim that Graham’s rent was not included in his reported total expenses. Danny suggests the overall damage award be reduced by $10,000 in rent as an added expense not previously considered.

¶ 32 Graham testified at trial, relying on plaintiff’s exhibit No. 6 (a chart of estimated and actual earnings and expenses), that his total estimated income for the 2014 crop year would be $56,831 for both corn and beans. He also testified he would have “estimated expenses” in the amount of $42,968, leaving a net profit of $13,863. When asked about the calculation of

"estimated expenses," Graham testified: "Those would have been the known expenses that I would have up front." Although not explicitly stated, it is reasonable to assume Graham would have likely included the rent amount as a "known" and up-front expense, as it was specifically included in the lease as a required term.

¶ 33 In its final order, the trial court found Graham's "testimony as to damages are [*sic*] credible." Because we have no reason to disturb the court's calculation of damages, *i.e.*, there is evidence to support the same, and there is nothing to suggest the court ignored evidence or used an incorrect measure of damages, we affirm the damages award, finding it is not against the manifest weight of the evidence.

¶ 34 C. Dead Man's Act

¶ 35 Finally, Danny contends Graham's attorney was not entitled to raise a Dead-Man's-Act objection during Bower's testimony because he was not a representative of Frank's estate. He also claims Bower should have been allowed to testify about the conversation he had with Frank regarding Frank's alleged desire to terminate the lease.

¶ 36 The Dead-Man's Act provides:

> "In the trial of any action in which any party sues or defends as the representative of a deceased person ***, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased *** or to any event which took place in the presence of the deceased ***." 735 ILCS 5/8-201 (West 2012).

¶ 37 As used in the Dead-Man's Act, "[r]epresentative" is defined as "an executor, administrator, heir[,] or legatee of a deceased person[.]" 735 ILCS 5/8-201(b) (West 2012); *Gunn v. Sobucki*, 216 Ill. 2d 602, 609 (2005). The Dead-Man's Act protects decedents' estates

from fraudulent claims and equalizes the parties' positions in regard to giving testimony. *Id.* The objective of the Dead-Man's Act is fairness. *Vazirzadeh v. Kaminski*, 157 Ill. App. 3d 638, 645 (1987). "The Dead-Man's Act is intended to remove the temptation of a survivor to testify to matters that cannot be rebutted because of the death of the only other party to the conversation or witness to the event, but it is not intended to disadvantage the living." *Balma v. Henry*, 404 Ill. App. 3d 233, 238 (2010) (citing *Hoem v. Zia*, 159 Ill. 2d 193, 201-02 (1994)).

¶ 38 In response to Graham's forfeiture argument, Danny claims he has not forfeited this issue for review because he argued at trial "that the testimony he intended to illicit from Randall Bower should be admissible as an exception to the Dead-Man's Act[.]" However, that is *not* the claim he presents on appeal. Danny did *not* argue before the trial court that Graham's attorney was not entitled to raise an objection because he was not a representative of the estate. He argued only whether certain exceptions applied. Because the trial court did not have the opportunity to determine whether Graham and his attorney were entitled to raise a Dead-Man's-Act objection and because Danny raises the issue for the first time in this appeal, we find the issue forfeited.

¶ 39 Danny also claims the trial court erred in excluding Bower's testimony regarding his conversations with Frank about the notice to quit. During trial, Danny's counsel was questioning Bower about his contact with "Frank and/or Danny." Bower testified "the next contact was in October of 2013" for the purpose of preparing a notice to quit. Bower said: "And, as I recall, Frank wanted to terminate that relationship." Counsel asked if "during that period of time" he had met with Frank by himself. Graham's counsel objected on the basis of fairness and prejudice since Graham had been precluded from testifying regarding *his* prior conversations

with Frank. Ultimately, the trial court sustained the objection and precluded "any conversation Mr. Bower had with [Frank] as it pertains to this farm lease."

> "[T]he key to saving for review an error in the exclusion of evidence is an adequate offer of proof in the trial court. [Citation.] Counsel makes an adequate offer of proof if he informs the trial court, with particularity, of the substance of the witness' anticipated answer; an offer of proof that merely summarizes the witness' testimony in a conclusory manner is inadequate." *Snelson v. Kamm*, 204 Ill. 2d 1, 23 (2003).

¶ 40 Without an adequate offer of proof, this court is unable to determine whether the trial court abused its discretion by precluding the anticipated testimony. *Id.* at 24 (trial court's ruling on the exclusion of evidence is subject to abuse-of-discretion standard). Danny argues Bower should have been permitted to testify regarding his professed conversation with Frank. We cannot make a determination when we are not aware of the nature of the conversation. This is so especially in light of Danny's trial counsel's statement to the trial court that he was "not intending to elicit testimony about [specific conversations with Frank that may prejudice Graham]." Without knowing the substantive nature of the proposed testimony, we cannot determine whether the exclusion of that testimony was proper. See *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495 (2002) (the failure to make an offer of proof of excluded evidence results in forfeiture of the issue on appeal). We find this issue forfeited as well.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the trial court's judgment.

¶ 43 Affirmed.